Thurston Motor Lines, Inc. *and* Teamsters Freight Employees, Local No. 480, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 26-CA-8150

September 15, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 19, 1981, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a response to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order,[2] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Thurston Motor Lines, Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

1. Substitute the following for paragraph 2(b):

"(a) Offer employees K. Wilson Duke and Steven Addis immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings in the manner set forth in this Decision."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT coercively interrogate our employees about their union activities.

WE WILL NOT warn our employees that they will lose their profit-sharing plan or that their jobs will be in jeopardy if they select Teamsters Freight Employees, Local No. 480, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, as their bargaining representative.

WE WILL NOT tell our employees that it would be futile for them to select the Union, or any other labor organization, as their bargaining agent or threaten our employees with layoffs or other reprisals if they select the Union, or any other labor organization, as their bargaining agent or threaten our employees with layoffs or other reprisals if they select the Union, or any other labor organization, as their bargaining agent.

WE WILL NOT discourage membership in Teamsters Freight Employees, Local No. 480, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminatorily discharging any of our employees or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL offer employees K. Wilson Duke and Steven Addis immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed,

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

and WE WILL make them whole for any loss of earnings, with interest.

THURSTON MOTOR LINES, INC.

DECISION

STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge: The Union filed an unfair labor practice charge in this case on November 13, 1979. The General Counsel issued a complaint on January 3, 1980. A hearing was held in Nashville, Tennessee, on May 12, 13, and 14, 1980. Briefly, the General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by warning, threatening, and coercively interrogating its employees with respect to their protected union activities and, in addition, by discriminatorily discharging employees Steven Addis and K. Wilson Duke. Respondent denies that it has violated the Act as alleged.

Upon the entire record in this case, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by counsel, I make the following:

FINDINGS OF FACT

I. THE SETTING

Respondent transports freight and is admittedly an employer engaged in commerce as alleged. The Union is admittedly a labor organization as alleged. About August 1979, the Union initiated a campaign to organize the Company's some 2,000 employees. The Company opposed the Union's effort. We are concerned here only with conduct occurring at Respondent's facilities in Nashville, Tennessee. The pertinent evidence is summarized below.

II. THE UNFAIR LABOR PRACTICES

A. *The Interrogation of and Threats to Employees*

Employee K. Wilson Duke testified that he worked for the Company some 12 years prior to his firing on October 16, 1979. Duke recalled that the Union's organizational campaign at Nashville commenced about August 1979. Duke explained that he and his coworkers "got together and started talking about" union representation; later, the employees met with a union agent and "got going," and Duke:

> . . . got cards and got them signed . . . . [The employees] had meetings and talked about what [they] were going to do; just the general things you do in a campaign.

Duke obtained the signatures of some 15 to 20 coworkers on union membership cards.

Duke testified that about 3 weeks before his firing Company President Franz Holscher visited the Nashville terminal and addressed the assembled employees. Duke recalled that in his speech Holscher:

> . . . was poking fun at the Union. He said if we hadn't already had a barbeque or something like that . . . we was getting cheated . . . because he had heard that Nashville was 100 percent [in favor of the Union] . . . . [I]t didn't make any difference what he told us . . . he knew we was 100 percent anyway . . . . [And] he said it really didn't make any difference to him because he had a 10 year contract.

Duke further recalled that Holscher also told the assembled employees:

> [W]e could not operate under a Union contract, and he showed us a bunch of companies that the Union had broke, and he also went on to say that our jobs might be in jeopardy if we did vote the Union in, and if we had voted [it] in last year . . . they would have lost $13 million.

A few days later, as Duke next testified, Company District Representative William Martin and Terminal Manager Thomas Riley went to a local tavern in Nashville where Duke and his coworkers socialized and drank. There, Martin had the following conversation with Duke:

> [H]e [Martin] said, "Duke what do you think is wrong with the Company, why is the morale down and why [is] the freight . . . so bad." I [Duke] said, "One thing is because of the speech that Mr. Holscher came down and made . . . ." [Martin] said, "[T]ell me about it . . . ." I said, "[A]ll he did was come down and made most of the people mad . . . . [A] lot of people that wouldn't have signed a card for the Union now will sign one . . . all he done is help us get more cards signed.

Duke related Holscher's speech to Martin. Then, Martin asked Duke, "[W]hat else do you think it is." Duke complained about, among other things, "our insurance." Duke added; "[O]ur insurance costs more than Union dues would cost."[1]

Employee Tom Burney testified that he too was present at the Nashville tavern when District Representative Martin discussed the Union with coworker Duke. Martin was overheard asking Duke to "give them more time." Burney further testified that Company Supervisor Ted Dyer, the Nashville dock foreman, discussed the Union with him "a couple of times" about October and November 1979. Dyer, on these occasions, asked Burney "what the employees felt, how they felt, about . . . the Union." Burney replied, "I told him that I kind of felt like everybody else, that we just needed more money."

Employee Steven Addis testified that he worked for the Company about 2 years prior to his firing on or about October 13, 1979. Addis recalled that Company

[1] Duke noted, in his testimony, that when Martin first approached him in the Nashville tavern, Duke, in response to Martin's questions, said, "[H]e [Martin] would probably fire me [Duke] for saying this . . . I was going to tell him exactly how it was . . . . [H]e assured me that I would not be fired. And, two weeks later I was fired." The events attending Duke's firing are discussed below.

Supervisor Dyer, commencing about August 1979, "would wander up" to the employee "and he'd say . . . what do you think about the whole thing . . . about the Union situation in the Company." Dyer also asked Addis "what everybody was talking, and what they felt about the Union, and everything else." Addis replied to Dyer that the employees were talking about "the way working conditions were, and the equipment the way it was, and [they] had people running the place that didn't half way know what they were doing . . . you couldn't help but go for the Union." Addis noted that Dyer and he had these conversations three or four times a week during the weeks prior to his firing.[2]

Employee Mark Carter testified that Supervisor Dyer also had "several discussions" with him pertaining to the Union during September and October 1979. Carter asked Dyer "what he thought. . . would happen if the Union was to be voted in." Dyer responded, "[T]here would be substantial layoffs because Thurston would have to catch longer hauls to increase their revenue." On cross-examination, Carter explained that he did not "always" approach Dyer during the above conversations—Dyer approached Carter on occasion "to talk about the Union."

Employee Donald Lovett also attended Holscher's speech. Lovett recalled that Holscher told the assembled employees that:

> . . . they [the Teamsters] were going to try and organize Thurston, and that he didn't like it, and . . . the very existence of Thurston to operate is being threatened by the Teamsters. . . . He [Holscher] said that there were Teamster members that were out of work that were paid up, they had cards, that if the . . . Teamsters had a contract with Thurston they would be there getting our jobs because they were losing membership constantly.

Holscher warned "that the Union was out to break trucking companies, and he stated . . . several trucking companies that he said had been broken by the Union." Holscher added that:

> . . . we should give them [the Company] a chance before we did anything about the Union, because he said he had heard all over the system . . . that [the] Nashville terminal is 100 percent Union.

Employee John Holmes was also present at Holscher's speech at the terminal and, later, at the tavern where Martin met with the employees. Holmes recalled Holscher's stating to the assembled employees, in part, as follows:

> [W]e have the money and we are going to fight it . . . . [He] said that the Union . . . had a bunch of members laid off at other locations and if you organize, those guys will come right in here and take your jobs. . . . [He] said, you are all familiar with the profit sharing plan that Tyler Corporation has set up [Tyler had recently acquired Respondent's business], and he said, I promise you that anyone that's a member of a union will not benefit from this profit sharing plan. . . . He said that if the Union organized Thurston . . . there would be a big layoff, and a lot of you guys would be losing your jobs . . . . [He] said that if the Union came in that it didn't necessarily mean we would get a contract . . . . He said that we could not operate under a Union contract. If we had been operating under one in the year 1978 we would have lost $6 million.[3]

In addition, Holmes recalled that Martin later told him at the Nashville tavern, "[T]his is no time to rock the boat and start trouble." Martin asked the employee "to give Tyler Corp. a chance."

Company Supervisor Dyer acknowledged that he talked to the Nashville employees "about a Union"; that he "probably" said to employees "that Thurston is a short-haul company and . . . if the Union came in it may not be economically feasible to handle that kind of freight . . . the interstate freight"; and that Respondent "could not handle the kind of freight that [they] were handling under a Union contract." Dyer was asked, *inter alia*, whether he had "ever had occasion to approach" employee Burney "on the dock and raise the question about the Union with him." Dyer claimed that, to his "knowledge," he did not "approach" Burney "to raise the question of the Union." Dyer denied in part various other statements and conduct attributed to him by the employee witnesses.

Company President Holscher testified that he addressed the assembled Nashville employees; that he "had a prepared talk . . . and other printed material" (see Resp. Exhs. 1 through 9); that "he read the speech word for word"; that he also "read from the [other] materials"; and that he did not depart from this printed textual material. Holscher denied, *inter alia*, making any reference to a 10-year contract with Respondent and various other statements attributed to him by the above employee witnesses. Elsewhere in his testimony, Holscher acknowledged stating to the assembled employees, "I had heard that you were already 100 percent and there is no need for me to give this speech." This statement admittedly was not contained in Holscher's printed materials.

Company Representative Martin acknowledged that he spoke with employee Duke at the tavern, as recited above. Martin claimed that he was present at the tavern because an employee named Harold Anderson had "asked" him "to be there"; that he discussed "the Union situation" with Duke; and that Duke did not disclose his "sentiments" concerning the Union. According to Martin:

> I expressed my opinion that I didn't think it was in the best interests [of] the Company nor the employees.

I credit the testimony of employees Duke, Burney, Addis, Carter, Lovett, and Holmes as recited above. Their testimony is in significant part mutually corroborative. They impressed me as reliable and trustworthy witnesses. On the other hand, I was not impressed with the

[2] The events attending Addis' subsequent firing are discussed below.

[3] Further, as Holmes noted, Holscher referred during his speech to a 10-year contract which he assertedly had with Respondent.

testimony of Dyer, Holscher, and Martin. Their testimony was at times unclear, vague, incomplete, and evasive. Insofar as the testimony of Dyer, Holscher, and Martin conflicts with the testimony of Duke, Burney, Addis, Carter, Lovett, and Holmes, I credit the testimony of the latter as more complete and reliable. In particular, I do not believe Holscher's assertion to the effect that he adhered to the text of a written speech prepared by his counsel during his Nashville visit. I am persuaded, instead, that he deviated from this text and in fact made the statements attributed to him by the above employee witnesses.

B. *The Firing of Employees Duke and Addis*

1. Duke

Duke, as recited above, testified that he worked for Respondent about 12 years prior to his firing on October 16, 1979; that he was active in the Union's organizational campaign and wore a union button at work; and that Company District Representative Martin questioned him some 2 weeks before his firing at the Nashville tavern concerning the campaign. Duke recalled that, in response to Martin's questions, Duke stated to Martin, "[O]ur insurance costs more than Union dues would cost" and "a lot of people that wouldn't have signed a card" before Company President Holscher's speech at the terminal "now will sign . . . all he done is help us."

Duke testified that about 8 a.m. on October 16, 1979, he reported for work at the Nashville terminal, obtained his equipment checkout card, picked up his tractor, hooked up the tractor, turned in his card, and was later told by Assistant Terminal Manager Joe Grisham that "another order" would have to be added to his scheduled deliveries for that day.[4] Duke then "loaded the extra freight" and told Dispatcher Kenneth McGill that "I probably wouldn't call in that day because I wouldn't have time, because I was loaded so heavy." McGill said, "Okay." Duke, as he recalled, "left" the Nashville terminal about 9:05 or 9:10 a.m. He would "usually leave the terminal" about 8:15 to 8:20 a.m.; however, the loading of this additional freight "cost [him] about an hour extra."

Duke related the various deliveries which he made that day in the Gallatin area. He recalled making his last delivery at the "Big K store" in Gallatin. He finished this delivery about 1:15 or 1:20 p.m. Duke testified:

> I left Big K, and went and picked up my lunch at McDonald's and came back to the Big K parking lot and ate lunch.

Duke returned to the Big K parking lot about 1:30 or 1:35 p.m. and took about 1 hour and 15 to 20 minutes for lunch. Duke explained:

> I didn't get any breaks that morning and I knew I wasn't going to get any that evening, so I thought maybe I deserved a break, because I worked the complete time without taking any lunch to get my freight off, because I wasn't sure I would get it all off that day.

Duke left the Big K parking lot about 2:45 p.m. Duke testified:

> I left there and drove straight to Hendersonville which takes about 30 minutes . . . and I seen this [other company driver, J. B. Thompson] coming into Rivergate parking lot, and I stopped him and I asked him if he needed any help, and he said no, he just had called in, and said there wasn't anything to do, and he was going in as soon as he caught that stop.

Duke then started his drive back to the terminal. However, he stopped for a cup of coffee at the Waffle House in the area. He arrived back at the terminal about 3:45 p.m.

Duke testified that, upon his arrival back at the terminal, Terminal Manager Thomas Riley "told me I was terminated." Duke asked for the "reason" why he was fired and Riley replied, "You took three hours for lunch." Duke protested that he "hadn't [taken] three hours lunch for the whole week." Management has claimed that Duke was fired for "sleeping on the job." (See G.C. Exh. 4, Duke's termination notice, dated October 18, 1979, citing "sleeping on the job" as the "reason for termination.") Duke denied this assertion. Duke also explained that he was not given this "reason" when he was fired. Further, Duke explained that he had never been warned or reprimanded by Respondent with respect to his work or productivity. His only warnings from Respondent pertained to two accidents some 6 years earlier.

Former Manager Riley testified that he fired employee Duke "because he was found sleeping on the job" for "an hour and a half beyond his [1-hour] lunch break on or about October 15 or 16.[5] Riley claimed that he and Road Safety Supervisor William Talbert followed and tracked Duke on the day Duke was terminated because "Mr. Duke was not a good driver." Riley, however, admitted that Duke was not fired for "low or poor productivity."[6] Further, Riley admitted stating to Lance Sumrell, former sales manager for Respondent, on the day following Duke's termination, "[I]t was a shame that Duke had to be fired because he rated 98 percent proficiency." Riley was referring to Duke's high rating by Respondent's efficiency engineer in a study recently made at the terminal.[7] Riley also admitted that he was unaware of any prior warnings or reprimands issued to Duke for poor productivity or for any other reasons.

Terminal Dispatcher McGill faulted employee Duke for not "calling in" on the day Duke was fired. McGill claimed that drivers like Duke are instructed "to call in

[4] Grisham did not testify.

[5] Riley insisted that he fired employee Duke "first" and coworker Addis later. Riley, however, acknowledged that Addis was terminated on or about October 13. Also compare G.C. Exhs. 3, 4, and 5.

[6] According to Riley, Talbert had attempted to follow Duke a day or so before this incident but "lost him." Talbert did not testify.

[7] Sumrell acknowledged that Duke was a "good worker."

because sometimes they have something they can pick up." McGill testified:

> Q. Directing your attention to Mr. Duke, had you had any occasion to talk to him about calling in?
>
> A. Yes. I had talked to him two or three times, and—
>
> Q. When did you talk to him.
>
> A. I can't give you an exact date; but, I have talked to him about not calling in regular.
>
> Q. Can you tell approximately how long before his discharge you talked to him?
>
> A. Oh, I had talked to him at least two times within two or three months before that.
>
> Q. Directing your attention to the day Mr. Duke was fired, did you have any occasion to inform him on that date not to call in?
>
> A. No, sir.
>
> Q. Did you in any way depart from your normal procedures on that day?
>
> A. No, sir.
>
> Q. Mr. McGill, on the day in question, did you have occasion to talk to Mr. J. B. Thompson in the afternoon of that day?
>
> A. Yes, I talked to him on the radio, and he had a pick-up that he—
>
> Q. Excuse me. Let me ask you another question. What did you talk to him about that afternoon?
>
> A. It was on the fact that he was covered up—had a lot of freight; he called in and asked me what to do, whether to go on and deliver, or try to start picking up. I told him to go on and deliver, that I expected Duke to call in, and that I would give him the GE [pickup] in Hendersonville, which was on his way back.
>
> Q. Did Mr. Duke call in that afternoon?
>
> A. No, sir.

McGill explained that drivers fail to call in "maybe one or two a month, and I would say something to them, because they are instructed to call me." As noted, Duke was never issued a reprimand for failing "to call in" and, in addition, this is not the reason cited by management for Duke's firing. (See G.C. Exh. 4.)

James Thompson, a driver employed by the Company, claimed that he and Duke left the terminal about 8:15 a.m. on the day Duke was fired; that Duke "was behind me or in front of me" in his vehicle; and that they both stopped at the Rivergate shopping center for a morning break. Thompson claimed that they have coffee at the Rivergate shopping center "most mornings." Thompson claimed that he later saw Duke again about 3 p.m. that day at the Waffle House in the Rivergate shopping center "when I was eating lunch." Thompson related the following conversation with Duke:

> I called in, you know, to see if I had any pickups, and I was supposed to of got GE in Hendersonville, and I had . . . never eaten lunch, and I was real busy too, and they told me to go ahead and deliver, you know, that they would let Duke get it; and when I was at the Waffle House, when he walked in, I asked him did he get GE, and he said no, and I said well they told me that you was going to get it. I said you better call in.

Thompson claimed that Duke left the Waffle House and "he was in front of me coming to Nashville." Thompson did not make the "GE pick-up" because "they told me not to." Elsewhere in his testimony, Thompson claimed that he had "not talked to anybody about the last day Duke worked . . . until today"— that prior to "today" he had had no "conversation with anybody at Thurston" regarding his testimony. Thompson added:

> I haven't talked with anybody, not even Duke. Most of the time I talk to him a lot. I haven't even talked to him, nobody about nothing.[8]

I credit the testimony of Duke as detailed above. As noted, he impressed me as a reliable and trustworthy witness. On the other hand, I do not find trustworthy the vague, incomplete, contradictory, and shifting assertions of Riley and McGill. Although Duke was assertedly fired for sleeping on the job, Riley and McGill attempted to shift to other reasons for firing the employee, such as poor or low productivity and failing "to call in." I am persuaded here that Duke, as he credibly testified, did not sleep on the job, did not call in on the day in question because he was told that he did not have to, and was otherwise regarded by management as a good worker. I am persuaded here that management has seized upon these reasons as a pretext in an attempt to justify the unlawful firing of this known union supporter.

Further, I do not credit the testimony of Thompson as recited above. I find here that Thompson is mistaken in his assertion that he met with Duke two times on the day in question. Thompson may be confusing this incident with another day since this so-called morning coffeebreak was a regular or routine event. In fact, Thompson was unsure of the month when this incident occurred. Further, I note that Duke credibly testified, without contradiction, about his extra load on the day in question and that he left the terminal approximately 1 hour later than usual. Thompson, on the other hand, left the terminal at his usual time. In addition, I do not find credible Thompson's recollection of his afternoon meeting with Duke. I do not believe that Duke, employed by the Company for some 12 years and regarded as a good worker with a high proficiency rating, would ignore an instruction from Thompson that he "better call in." Again, I note that management did not cite this reason for terminating Duke.[9]

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[8] On rebuttal, Duke adhered to his testimony, as recited above, concerning his afternoon conversation with Thompson at the Rivergate shopping center. Duke also denied having a break with Thompson on that day.

[9] James Gregory was called by the General Counsel to corroborate in part Duke's testimony concerning his schedule of deliveries on the day in question. Gregory worked for an employer assertedly receiving deliveries on that day. I do not rely upon Gregory's recollection of the specific time of Duke's delivery on that day. Gregory, at times, appeared confused.

2. Addis

Employee Addis testified, as recited above, that he had worked for Respondent some 2 years prior to his firing on October 13, 1979; that he had never received a reprimand from Respondent on any prior occasion; and that Company Representative Dyer previously had questioned him at work about employee union activities and interests. Addis, in response to Dyer's questions, disclosed to Dyer that:

> . . . the way working conditions were, and the equipment the way it was, and [they] had people running the place that didn't half way know what they were doing, you know, you couldn't help but go for the Union.

Addis recalled that he reported for work at the terminal about 11:30 p.m. on October 11; that he was then working as a hookup man which generally involved connecting, disconnecting, and servicing tractors and trailers; that each such hookup took about 20 to 30 minutes; that he was initially assigned that evening six hookups to perform by his supervisor, Dispatcher Randy Hammontree; that he finished these hookups about 1:30 a.m. the morning of October 12; and that he then took his 15-minute break. Addis explained:

> Q. Okay. Would you please tell us, as best you can remember what you did that evening from the time you came into work, until the time you were allegedly caught asleep?
>
> A. All right. Well, I remember distinctly I walked in the door that night, and I walked in and clocked in, and as soon as I clocked in Randy—Randy Hammontree, he walked up to me with a card that had six hook-ups on it, and he said, "I'm glad you're here, I've got something for you to do." So, I took the hook-ups and laced up my boots and went out on the yard and started working, you know, started making my hook-ups. Okay. So, I got done with the first six hook-ups I made, and I came back in and Randy is in there on the teletype—the computer . . . . He was making dispatches on the computer, because once they are gone you have to key it into the computer. So, I knew he was busy and he had some more stuff that I had to do, and this was like at 1:30 when I came in, I remember looking up at the clock, because I had noticed that the first break had already passed.
>
> So, I just went on in and sat down—went in the sales office and sat down, figured I'd take my 15 minute break while I had a chance to, because I had already missed, you know, everybody else taking their breaks, they took it at a special time. So, I just went in there and lay down, I took, you know, was laying there taking my break, and Randy Hammontree came in just like I had two or three minutes left on my 15 minute break. He came walking in the door and said, "I got some more hook-ups for you." So, I just took the card—he always had them wrote down on a card, you know, the tractor number and the trailer number.
>
> So, I just took the card and said, okay, and took off after, you know, made the next hook-ups, and he never said anything to me to the effect, where you been, you know, what are you doing in here, nothing like that; he just said, "I've got more hook-ups for you." I said, "Okay," and took off.
>
> * * * * *
>
> Q. What, if anything, did Mr. Hammontree say about you sleeping?
>
> A. Nothing.

Addis noted that it was "common practice" on the night shift to "lay down and nap on breaks" and that "when I got caught up I just sat down and [would] take my break." According to Addis, employees were permitted to take their breaks in the nearby sales office:

> [W]e never had anything said to us other than one time Ted [Dyer] told us not to put our boots on the desk, because they were complaining about mud on the desk in the morning. He [Dyer] said, "[I]f you are going to lay down, hang your feet off the end."

Addis left the terminal after completing his shift on the morning of October 12. He was later notified to report to the terminal. Later, on October 12 or 13, Addis reported to Dyer. Addis testified:

> He [Dyer] told me he didn't know anything about it. He said he had just been told that I had been terminated for sleeping on the job. He said he didn't know anything about it because he wasn't there when it happened.

Employee Carter testified that it was common for hookup employees to take naps on their breaks. Carter recalled observing Dispatcher Hammontree "asleep on the desk in the sales office." Carter also testified that he was "never told" not to sleep in the sales room— "I've been told not to put my feet up on the desk." And, Donald Pionke, previously employed by Respondent as a dispatcher, explained that it was "common practice" to sleep on breaks; that hookup men like Addis would take a break when they were "caught up"; that the taking of breaks was a "very loose" practice; and that Addis was "a very good employee."[10]

Ted Dyer, in-bound supervisor for Respondent's third shift at the Nashville terminal, testified that "I'm in charge of everybody and everything on the night shift"; that Night Dispatcher Randy Hammontree also "reports directly" to him; and that he notified employee Addis that Addis was "fired." Dyer was asked, "[W]ere you at the terminal when Mr. Addis was allegedly found asleep?" He responded:

> I do not know. As I told you, I may or may not have been. It was brought to my attention, so I do

[10] Employee Lovett also recalled finding Dispatcher Hammontree "asleep" at work.

> not know whether I was there at the time or not. I very well could not have been. I do not know.

Dyer, however, acknowledged that he did arrive at the terminal "sometime during that evening" and Hammontree did not report the alleged sleeping incident to him during that evening. Dyer "didn't take any part in this decision of terminating Addis." Dyer regarded Addis as a "satisfactory" employee.

Dyer claimed that he had reprimanded Addis and a coworker. Dyer explained:

> I don't know whether you would call that a reprimand or not; they were both instructed to be where they could be located at all times except when they were on break. . . . I may have gone further and told him [Addis] we had some complaints about some people sleeping in the sales office or putting their feet on the desk. I do not remember. I remember I talked to both of them and the second shift switchers about staying out of the sales office and staying where they could be found when they were needed, because I was getting complaints from the dispatchers.

Dyer acknowledged that it was not unusual for employees to nap during their break periods; that warehouse employees have scheduled breaks and a bell rings when their breaks end to wake them up; that hookups like Addis have no scheduled breaks; that it is "customary . . . for [the] immediate supervisor to tell [employees like Addis] when a break is up"; and that "people have been late coming back from breaks."

Dispatcher Hammontree testified as follows:

> Q. Do you know in the case of Addis . . . you recommended that Addis be fired, is that correct?
>
> A. Well, I gave the terminal manager all of the facts, and he evaluated them, and made his own decision.

Hammontree added:

> I did not recommend Mr. Addis be fired. I reported the infraction of Company policy to the terminal manager.

Hammontree claimed that Addis had received a telephone call about 12:35 a.m. on the evening in question; that he noticed Addis missing after 1 a.m.; and that about 1:20 or 1:25 a.m. "I found" Addis "on the desk in the sales office." Hammontree acknowledged that Addis, prior to taking the telephone call, "told me he had finished his hookups." Hammontree also testified:

> Q. Did you ask him [Addis] if he was on break or not?
>
> A. I believe I did, yes.

Hammontree testified later, after reading his affidavit, "Apparently not." Hammontree did not report this incident to his immediate supervisor, Dyer. Hammontree later reported this incident to Riley as follows:

> I [Hammontree] told him [Riley] very basically that Mr. Addis was asleep on the job—he was not on break. Mr. Riley made the decision to fire him.

Former Manager Riley claimed. "I fired Addis for sleeping on the job." Riley acknowledged that "where he [Addis] was sleeping has . . . no bearing on it." Riley, who did not witness this incident, testified:

> I [Riley] asked Mr. Hammontree precisely if the man told him he was on break when he woke him up and at that point he informed Mr. Hammontree that he was not.

Riley acknowledged that this was "the first time that [he] had caught Mr. Addis sleeping on the job." Riley became confused as to whether employee Duke was fired by him before Addis for this same alleged offense. (Cf. G.C. Exhs. 3, 4, and 5.)

District Representative Martin acknowledged that, in effect, the last known employee to be fired at Nashville for "sleeping on the job" was Earl Lucas. Lucas was fired on October 1, 1974, for "sleeping on job." (See Resp. Exh. 10.) However, Lucas' termination notice states:

> Lucas was warned about this on 9-17-74. He was in dock shack with lights out with shade over window preparing to go to sleep.[11]

I credit the testimony of Addis, Carter, Pionke, and Lovett, as recited above. Their testimony is in large part mutually corroborative and, as stated, they impressed me as reliable and truthworthy witnesses. I do not credit the testimony of Dyer, Hammontree, Riley, Jones, and Martin insofar as it contradicts the testimony of Addis, Carter, Pionke, and Lovett. The testimony of Dyer, Hammontree, Riley, Jones, and Martin was at times unclear, contradictory, incomplete, and evasive. In sum, as discussed below, I reject as pretextual Respondent's alleged reason for firing Addis. I am persuaded here that neither Addis nor Duke was fired for allegedly "sleeping on the job."

C. *Discussion*

The General Counsel alleges that Company President Holscher, in his speech to the assembled Nashville employees, violated Section 8(a)(1) of the Act by warning the employees "that they would lose their profit sharing plan" and "their jobs were in jeopardy if they selected the Union" and, further, by apprising the employees "that it would be futile to select the Union as their bargaining representative." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their right to self-organization. Section 8(c), in turn, provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute

[11] William Jones, a night clerical employee, testified that Addis received a telephone call on the night in question. Addis denied receiving a call that evening.

> or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Read together, these provisions leave an employer free to communicate to his employees his views respecting unions, so long as that communication does not contain a "threat of reprisal or force or promise of benefit." As the Supreme Court stated in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 616-620 (1969):

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely as those rights are embodied in Section 7 and protected by Section 8(a)(1) and the proviso to Section 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.
>
> * * * * *
>
> [A]n employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *N.L.R.B.* v. *River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967).

And see *Surprenant Manufacturing Company* v. *N.L.R.B.*, 341 F.2d 756, 761 (6th Cir. 1965); *N.L.R.B.* v. *Harold Miller d/b/a Miller-Charles and Company, et al.*, 341 F.2d 870, 873 (2d Cir. 1965); *International Union of Electrical, Radio and Machine Workers, AFL-CIO* [*NECO Electrical Products Corporation*] v. *N.L.R.B.*, 289 F.2d 757, 763 (D.C. Cir. 1960); *N.L.R.B.* v. *Kolmar Laboratories, Inc.*, 387 F.2d 833, 836-838 (7th Cir. 1967); *N.L.R.B.* v. *Louisiana Manufacturing Company*, 374 F.2d 696, 702-703 (8th Cir. 1967).

The credited evidence of record in this case, as detailed *supra*, makes it plain that Company President Holscher unlawfully admonished employees that they would lose Respondent's profit-sharing plan and their jobs would be in jeopardy if they exercised their Section 7 rights and chose union representation. Likewise, Holscher made clear to the employees that it would be futile for them to choose union representation because Respondent "could not operate with a union" in violation of Section 8(a)(1) of the Act. Thus, employees were told, *inter alia*, that they "could not operate under a Union contract"; that their "jobs might be in jeopardy if [they] did vote the Union in"; that "the very existence of Thurston to operate is being threatened by the Teamsters"; that unemployed Teamsters "would be there getting their jobs" if they "had a contract"; that the "Union was out to break trucking companies"; that "a member of a union will not benefit from this profit-sharing plan" of Respondent that "if the Union organized Thurston . . . there would be a big layoff and a lot of you guys would be losing your jobs."; that "it didn't necessarily mean that we would get a contract"; and that "we could not operate under a Union contract." Holscher, at the same time, emphasized that "it really didn't make any difference to him because he had a 10-year contract."

In sum, I find and conclude that Holscher, by making the above-quoted statements to the employees, infringed upon their Section 7 rights. For, as the Supreme Court noted in *Gissel, supra*:

> [A]n employer . . . cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "brinkmanship" when it becomes all too easy to "overstep and tumble [over] the brink." *Wausau Steel Corp.* v. *N.L.R.B.*, 377 F.2d 369, 372 (7th Cir. 1967). At least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

The General Counsel alleges that Company Supervisor Dyer violated Section 8(a)(1) by coercively interrogating and threatening employees regarding their protected union activities. Thus, as found *supra*, Dyer repeatedly asked employee Burney "what the employees felt, how they felt, about . . . the Union." Burney disclosed to Dyer the employees' support of the Union. Dyer, in a like vein, repeatedly questioned employee Addis about employee union activities and interests. Addis revealed his support of the Union. Dyer, during his various discussions of the Union with employee Carter, apprised Carter that "there would be substantial layoffs" if the Union were voted in "because Thurston would have to catch longer hauls."

I find and conclude that Company Representative Dyer, by the foregoing conduct, violated Section 8(a)(1) of the Act. Dyer's repeated unwarranted attempts to discover which employees were involved in the union campaign and to pry into protected union activities, coupled with management's stated opposition to unionization and threats of reprisal and retaliation, constitute the kind of coercive interrogation proscribed by Section 8(a)(1). See *N.L.R.B.* v. *Gladding Keystone Corporation*, 435 F.2d 129, 132-133 (2d Cir. 1970); and *N.L.R.B.* v. *Novelty Products Co.*, 424 F.2d 748, 751 (2d Cir. 1970). And, in this context, I find Dyer's warnings to employee Carter of "substantial layoffs" to be an unlawful threat in violation of Section 8(a)(1). These statements by management were also not "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." See *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. at 616-620.

Finally, the General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act by firing employees Duke and Addis because of their known union activities and interests. Respondent asserts that it terminated these two employees for "sleeping on the job." However, it has long been settled law that "the Board is not compelled to accept the employer's statement" of the reason for an employee's discharge "when there is rea-

sonable cause for believing that the ground put forward by the employer was not the true one, and that the real reason was the employer's dissatisfaction with the employee's" union or protected concerted activities. *Great Atlantic & Pacific Tea Company.* v. *N.L.R.B.*, 354 F.2d 707, 709 (5th Cir. 1966).

On the credited evidence of record here, I find and conclude that the real reason for the sudden firing of employees Duke and Addis was their known union activity and interest. Thus, as found *supra*, management was strongly opposed to the unionization of its employees. Company President Holscher, in his speech to the Nashville terminal employees, unlawfully threatened the employees if they exercised their Section 7 right to choose union representation. Holscher, at the same time, apprised the Nashville employees that he "knew" they were "100 percent" in favor of the Union. In addition, Company Representatives Dyer and Martin interrogated employees about their union activities and interests. Employees Duke and Addis, during such interrogations, disclosed to management their support of the Union. Shortly thereafter, both Duke and Addis were summarily terminated, without warning, for allegedly sleeping on the job. The last known employee to be fired for this reason was fired in 1974 and, at that time, the employee was first given a warning "about this."

Duke had worked for the Company for about 12 years. The only warnings he had received from Respondent concerned accidents some 6 years earlier. Duke was given a rating of 98 percent by Respondent's efficiency engineer. Duke was regarded as a good worker. Addis had worked for Respondent for about 2 years prior to his sudden firing. He had never received any reprimands and was a satisfactory employee. Management, in attempting to justify the unprecedented firing of these two employees without warning for allegedly sleeping on the job, shifted to other alleged faults. Management claimed that Duke was a poor driver and that Addis slept in the office contrary to instructions. I discredit these assertions as not supported by the credible evidence of record.

In sum, I reject Respondent's asserted reasons for the firing of employees Duke and Addis as a contrived attempt to justify the firing of two employees because of their union activities in violation of Section 8(a)(1) and (3) of the Act.[12]

[12] In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board held that, in cases raising the question whether an employer's discipline of an employee was motivated by lawful or unlawful reasons, it would require the General Counsel to establish a *prima facie* showing that protected conduct was a "motivating factor" for the employer's decision. The burden would then shift to the employer to show that the same action would have taken place even in the absence of such protected activity. Since I find in the instant case that Respondent, in firing employees Duke and Addis, was solely retaliating against the employees because of their known union activities and support, and since I reject as pretextual management's asserted reasons for the firings of these two employees, it is unnecessary for me to reach the *Wright Line* principle. In any event, on this record, Respondent, under *Wright Line*, has failed to show that the firing of Duke and Addis would have occurred in the absence of the employees' union activities. Indeed, as noted, the only employee fired for "sleeping on the job" in the past was fired only after receiving a warning. No such warnings were issued here.

The General Counsel's motion to correct the transcript, which is unopposed, is granted.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about protected union activities; by warning employees that they would lose their profit-sharing plan if they select the Union as their bargaining agent; by warning employees that their jobs would be in jeopardy if they select the Union as their bargaining agent; by telling employees that it would be futile for them to choose the Union as their bargaining agent; and by threatening employees with layoffs or other reprisals if they select the Union as their collective-bargaining representative.
4. Respondent violated Section 8(a)(1) and (3) of the Act by terminating employees K. Wilson Duke and Steven D. Addis, and thereafter refusing to reinstate them, because they had engaged in protected union activities.
5. The unfair labor practices found herein affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find it necessary to recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It has been found that Respondent, in violation of Section 8(a)(1) and (3) of the Act, unlawfully terminated employees Duke and Addis. It will therefore be recommended that Respondent offer to both employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by reason of their unlawful terminations by payment to them of a sum of money equal to that which they normally would have earned from the date of Respondent's discrimination to the date of Respondent's offer of reinstatement, less net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[13] Further, it will be recommended that Respondent preserve and make available to the Board, upon request, all payroll records and reports and all other records necessary and useful to determine the amount of backpay due and the rights of reinstatement under the terms of these recommendations. Respondent shall also be ordered to post the attached notice.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[14]

The Respondent, Thurston Motor Lines, Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees about protected union activities.

(b) Warning employees that they would lose their profit-sharing plan and that their jobs would be in jeopardy if they select Teamsters Freight Employees, Local No. 480, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, as their bargaining agent; telling employees that it would be futile to select said Union, or any other labor organization, as their bargaining agent; and threatening employees with layoffs or other reprisals if they select the Union, or any other labor organization, as their bargaining agent.

(c) Discouraging membership in Teamsters Freight Employees, Local No. 480, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily discharging any of its employees or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or conditions of employment.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer employees K. Wilson Duke and Steven Addis immediate and full reinstatement to their former jobs or to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings in the manner set forth in this Decision.

(b) Preserve and make available to the Board or its agents all payroll and other records as set forth in this Decision.

(c) Post at its offices and facility in Nashville, Tennessee, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."